Supreme Court, U.S.
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In The

# Supreme Court of the United States

SOUTHERN SCRAP MATERIAL COMPANY, L.L.C.,
as owner of the Southern Scrap Drydock,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Shipowners have traditionally had a statutory right under 46 U.S.C. §183(a) (recently recodified as 46 U.S.C. §30305 *et seq.*) to limit their liability for maritime accidents to the value of their vessel plus pending freight, when the accident occurred without the owner's privity or knowledge. The United States government asserts a statutory right pursuant to 33 U.S.C. §§409, 414 and 415 to pass along the cost of removing sunken vessels and/or other wrecks from the navigable waters of the United States to owners who "sink, or permit or cause to be sunk, vessels or other craft in navigable channels . . . " even where the wreck occurred without the owner's fault. Did the Fifth Circuit apply an improper standard of statutory construction to conclude that these two federal maritime statutes are irreconcilable, such that the Petitioner is deprived of its substantive and procedural statutory limitation rights under 46 U.S.C. §183(a) as to the government's wreck removal claim under 33 U.S.C. §409 *et seq.*?

2. Prior to 1986, only negligent shipowners could be personally liable for wreck removal expenses under 33 U.S.C. §409, and limitation was denied to prevent the negligent party from shifting the consequences of its negligence onto an innocent party. The Fifth Circuit held that the 1986 amendments to 33 U.S.C. §§409, 414 and 415 impose wreck removal expenses even on innocent shipowners. If that is correct, and

**QUESTIONS PRESENTED** – Continued

the wreck was, as here, caused by the government's negligence, should an innocent shipowner be deprived of its statutory right to invoke a concursus and limit its liability under 46 U.S.C. §183(a), where the effect is to shift the cost of wreck removal from the negligent party to an innocent party?

3. It is axiomatic that repeal by implication of a federal statute by a later statute is disfavored, and will only be found where the two statutes are positively repugnant such that they cannot both be given effect. The Wreck Act, as amended in 1986, and the Limitation Act can both be given effect: The Wreck Act amendments created an *in personam* right of action against the owner of the wreck, which, like most other *in personam* claims, can in appropriate circumstances be limited under the Limitation Act. If the express language and scant legislative history behind the 1986 amendments to the Wreck Act failed to demonstrate a clear Congressional intent to repeal by implication the Limitation Act as to Wreck Act claims, did the Fifth Circuit err in holding that the Wreck Act and the Limitation Act are irreconcilable, such that the Limitation Act must give way to the more recent Wreck Act?

## RULE 29.6 STATEMENT

Petitioner, Southern Scrap Material Co., L.L.C., is a Louisiana limited liability company whose sole member is Southern Recycling, L.L.C. No publicly held company owns 10% or more of the shares or membership units of either Southern Scrap Material Co., L.L.C or Southern Recycling, L.L.C.

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## OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit in this case is unpublished, but is reprinted in the Appendix hereto, App. 1, *infra*. The opinion of the district court is reported at 2007 WL 1234995 and 2007 A.M.C. 2612 (E.D. La. 2007), and is reprinted in the Appendix hereto at App. 28, *infra*.

## JURISDICTION

The Fifth Circuit issued its Opinion and Judgment on August 25, 2008. App. 1, 26. This Court has jurisdiction pursuant to 28 U.S.C. §1254, and this Petition is timely pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.1.

## STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the complete text of 46 U.S.C. §183(a) (recodified at 46 U.S.C. §30505) and 33 U.S.C. §§409, 414 and 415.

## STATEMENT OF THE CASE

This case presents a collision between the federal government's asserted rights under the Rivers and Harbors Act of 1899, 33 U.S.C. §401 *et seq.*, and the Petitioner's statutory rights under the Shipowners'

Limitation of Liability Act, 46 U.S.C. §183(a) (recently recodified at 46 U.S.C. §30505 *et seq.*). Since 1851, shipowners have enjoyed a federal statutory right to limit their liability for accidents occurring without their privity or knowledge under 46 U.S.C. §183(a). The issue presented here is whether the Petitioner's limitation rights under §183(a) were repealed by implication by the Rivers and Harbors Act, precluding Petitioner from limiting its liability as to the government's statutory claim for wreck removal expenses. This Court has never considered that issue.

Before the 1986 amendments to the Rivers and Harbors Act, only negligent shipowners could be personally liable for wreck removal expenses. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). That rule followed from the sensible conclusion that a negligent shipowner should not be allowed to escape the consequences of its negligence by shifting the costs of wreck removal, which are often exorbitant, to an innocent party, the federal government. *Id.* at 204-06. Extending that logic, the Fifth Circuit had previously held that a negligent shipowner could not accomplish the same result by invoking the Limitation Act in defense of the government's wreck removal claim. *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438 (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). For the reasons this Court espoused in *Wyandotte*, limitation was denied to prevent the culpable shipowner from shifting the cost of wreck removal to

an innocent party, the government. *Id.* at 446, citing *Wyandotte*, at 200.

In the present case, the Fifth Circuit expanded this Court's decision in *Wyandotte*, and its own prior decision in *University of Texas*, to a situation contemplated in neither to support a conclusion contrary to both. Citing the 1986 amendments to the Rivers and Harbors Act, specifically 33 U.S.C. §§409, 414 and 415 (hereafter referred to as the "Wreck Act"), the court held that Wreck Act liability is no longer predicated on negligence, and even innocent shipowners can be burdened with the cost of wreck removal, even where, as alleged here, the government's negligence was the sole or primary cause of the wreck. The court further held, based on its prior holding in *University of Texas*, that even an innocent shipowner could not limit its Wreck Act liability under the Limitation Act. The court again declared that the Wreck Act and the Limitation Act were irreconcilable, and that the Wreck Act, the more recent of the two statutes, must prevail.

In so holding, the court below erred. First, the court overlooked the rationale and logic of this Court's decision in *Wyandotte*. The Fifth Circuit's holding in the present case achieved precisely what this Court disavowed in *Wyandotte*: allowing the negligent party to escape the consequences of its negligence by shifting the cost of wreck removal to an innocent party, here Petitioner. The Fifth Circuit reached this result by doing what this Court refused to do in *Wyandotte*: apply a narrow and technical

reading of the Wreck Act without reference to the underlying equities arising from the surrounding circumstances.

Second, the Fifth Circuit erred in holding that the Wreck Act, as amended, and the Limitation Act conflict irreconcilably. It is well established that repeals by implication are disfavored and will be found only when two statutes are positively repugnant. Congress has had numerous opportunities to repeal or limit the Limitation Act, but has chosen not to do so. And neither the imprecise language of the Wreck Act, nor the sparse history of the 1986 amendments, nor the perceived purpose of those amendments demonstrate the necessary clear congressional purpose to deprive an innocent shipowner of its statutory right to limit its liability under the Wreck Act when, as here, the requisites for limitation exist.

Moreover, both statutes can be given effect: The Wreck Act imposes personal liability on the shipowner, which, like numerous other claims, can be limited in appropriate circumstances under the Limitation Act. This does not thwart the fundamental purpose of the Wreck Act, because the Limitation Act will only prevent the government from making a full recovery under the Wreck Act in those limited cases, like the present one, in which a truly innocent shipowner did not cause, and could not have reasonably prevented, the wreck of its vessel. In those instances, there is no statutory, jurisprudential or equitable

justification for depriving the shipowner of its statutory limitation rights.

The Fifth Circuit thus improperly deprived Petitioner of its statutory rights under the Limitation Act. This Court should grant a writ of *certiorari* to correct this improper deprivation of Petitioner's federal statutory rights.

**1. Statement of Facts**

Hurricane Katrina was indisputably one of the worst disasters in United States history. No words, pictures or videos can adequately convey the sense of absolute devastation hanging over the New Orleans area in the wake of the hurricane.

Petitioner, Southern Scrap Material Co., L.L.C. ("Southern Scrap"), owns a scrap yard in the lower Ninth Ward of New Orleans, which is in a location that could be described, without hyperbole, as "ground zero" of Katrina's destruction: the junction of the Inner Harbor Navigation Canal ("Industrial Canal") and the Mississippi River-Gulf Outlet ("MR-GO"), a man-made navigable waterway extending from the Gulf of Mexico into the City of New Orleans.

Katrina was far more than just a natural disaster. To many in the New Orleans area and elsewhere, Katrina's biggest impact was through the failure of government, at all levels. Relevant to the present case, the U.S. Army Corps of Engineers ("the Corps") was responsible not only for the levee system

surrounding New Orleans, a system that proved to be fatally deficient, but also for the design, engineering, construction and maintenance of the MR-GO. The MR-GO magnified Katrina's destructive force in at least two ways. First, the MR-GO has for decades accelerated the loss of wetlands to the south and east of New Orleans and thus depleted the metro area's primary defense against hurricanes. Second, due to its improper design and construction, the MR-GO magnified the force and strength of Hurricane Katrina's storm surge as it raced up the MR-GO toward the Industrial Canal. Because of this "funnel effect," when the storm surge reached the junction of the MR-GO and the Industrial Canal, it pushed a wall of water more than 20 feet high, which inundated the Southern Scrap facility and caused at least three breaches in the Industrial Canal floodwalls, resulting in widespread flooding of the City of New Orleans.

Southern Scrap also owned a drydock measuring 220 feet long, by 157 feet wide, by 24 feet deep, and displacing 3868 long tons. In July 2005, the drydock was towed from the Ingalls Shipyard in Pascagoula, Mississippi to Southern Scrap's facility on the Industrial Canal in New Orleans, where it was properly moored and secured by lines and wire cables to the shore. Despite Southern Scrap's best efforts to secure the drydock against the approaching hurricane, when Katrina's unprecedented storm surge roared up the MR-GO and into the Industrial Canal, the drydock was ripped from its moorings and carried across the

Industrial Canal, where it partially sank near the northwest fendering system of the Florida Avenue Bridge.

No amount of securing could have prevented the escape and destruction of Southern Scrap's drydock. Katrina's storm surge left barges and vessels strewn throughout the Industrial Canal and on adjacent land. When the hurricane had passed, Southern Scrap found two barges on top of its dock, while another drydock and crane barge traveled about a mile from their moorings and were on Southern Scrap's land facility – 600 to 1,000 feet from the nearest body of water. There was simply nothing Southern Scrap or any other vessel owner along the Industrial Canal could have done to prevent the MR-GO storm surge from wrecking its vessels.

Following the storm, the Corps claimed that Southern Scrap's drydock created a hazard to navigation in the Industrial Canal. On 18 September 2005, the Corps commenced operations to remove the partially submerged drydock, without affording Southern Scrap the opportunity to remove the drydock itself.[1] The Corps' subcontractors completed the removal on or about 2 December 2005 at an inflated, unreasonable cost, using a method of removal that was completely illogical, impractical and unnecessarily

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[1] Southern Scrap strenuously maintains the Corps never even asked Southern Scrap to remove the drydock. Rather, the Corps unilaterally started this removal operation.

expensive. The Corps thereafter submitted a claim to Southern Scrap of more than $8 million for removal costs.

In short, Southern Scrap was not negligent in causing, and could not have prevented, the sinking of its drydock, whereas the federal government was primarily responsible for the wreck of Southern Scrap's drydock, as well as the widespread devastation Katrina caused throughout the New Orleans area. Yet, the government now seeks to impose on Southern Scrap the inflated costs of removing the sunken drydock.

## 2. Course of Proceedings Below

On 11 April 2006, Southern Scrap filed its petition in the district court seeking exoneration from or limitation of liability pursuant to 46 U.S.C. §183 *et seq.* and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. The Petition specifically sought exoneration from or limitation of liability as to all claims arising out of the sinking of Southern Scrap's drydock as a result of Hurricane Katrina. With its Petition, Southern Scrap filed an Ad Interim Stipulation in the amount of $316,131.64, representing the value of the drydock following the sinking.

With the filing of the Petition, the court below, also on 11 April 2006, issued an order restraining the prosecution of claims against Petitioner arising out of the sinking of the drydock outside of the limitation

proceeding (hereafter referred to as "the limitation stay order"). The limitation stay order provided that any party with a claim against Southern Scrap resulting from the sinking of the drydock must file that claim in the limitation action on or before 14 July 2006.

On or before that deadline, claims were filed by a number of parties. By far the largest of those claims was that of the United States, which claimed more than $8 million in wreck removal expenses under the Wreck Act, 33 U.S.C. §409.

On 22 December 2006, the United States moved the district court to lift or modify the limitation stay order to allow the United States to pursue its claim for wreck removal expenses outside the limitation action. The United States argued that its statutory claim for wreck removal expenses under §15 of the Rivers & Harbors Act, 33 U.S.C. §409, was not subject to limitation of liability. The United States' motion relied on authority holding that a negligent shipowner could not limit its liability under the Wreck Act and thereby shift the costs of wreck removal occasioned by its negligence to the government, an innocent party.

Southern Scrap opposed the United States' motion, arguing that this case presents a unique and *res nova* issue, because in this case, the owner of the wreck was not negligent, whereas the Wreck Act claimant, the United States government, was primarily responsible for causing the wreck. Southern Scrap

therefore maintained that the prior authority, which precluded limitation when the shipowner had been negligent and the United States had not, was inapplicable, both as a matter of law and equity. Southern Scrap further argued that the policies underlying the denial of limitation in the earlier cases – that the party whose negligence caused the wreck should not be allowed to shift the consequences of its negligence to an innocent party – supported Southern Scrap's contention that limitation should not be denied here, where Southern Scrap was not negligent and the United States government, specifically the Corps, was responsible for causing the wreck.

On 26 April 2007, the district court below issued its Order and Reasons granting the United States' motion to lift or modify the limitation stay order, thus allowing the United States to pursue its Wreck Act claim against Southern Scrap outside the limitation action. App. 28. The court held that since the 1986 amendments to the Wreck Act, a non-negligent vessel owner can be strictly liable for wreck removal expenses. App. 37. And, the court concluded, based on pre-amendment authority, even an innocent vessel owner cannot limit its liability for wreck removal expenses under the Wreck Act. *Id.*

Southern Scrap timely noticed an interlocutory appeal to the Fifth Circuit on 8 May 2007. The Fifth Circuit heard argument on 31 January 2008, and on 25 August 2008, that court issued its opinion affirming the district court. The Fifth Circuit held that the 1986 amendments to the Wreck Act (33 U.S.C. §§409,

414 and 415) imposed *in personam* liability on the owner of a wreck that obstructed a navigable waterway to the full amount of the government's wreck removal costs, regardless of fault. App. 18. The court further held that the Limitation Act presented an irreconcilable conflict with the 1986 amendments to the Wreck Act, in that permitting the owner of the wreck to limit its liability would thwart Congress's perceived intent to ensure that the government received full reimbursement of its wreck removal costs. App. 20. As the Wreck Act was the more recent of the two statutes, the court concluded that it prevailed over the Limitation Act, precluding Petitioner from limiting its liability to the government under 46 U.S.C. §183(a). App. 25.

## REASONS FOR GRANTING THE WRIT

This Court should grant the requested writ, because the issue presented is an important question of federal law affecting maritime commerce that has not been, but should be, settled by this Court. This Court has never sought to clarify what the Fifth Circuit has described as the "muddied waters that lie at the confluence of two desultory streams of nineteenth century thought," where "an impossibly obscure law (the 1899 Act)" meets "a hopelessly anachronistic one (the Limitation Act)." *University of Texas*, 557 F.2d at 441. This Court should review this matter because denying Southern Scrap its statutory limitation rights here violates this Court's express

dictates in *Wyandotte* by allowing the government to shift the consequences of its negligence onto this innocent shipowner.

Moreover, neither the imprecise language of the Wreck Act, nor the sparse history behind the 1986 amendments, nor the perceived purpose of those amendments establish the clear and manifest Congressional purpose required to nullify Southern Scrap's statutory limitation rights. Repeals by implication are disfavored and are proper only where two statutes are positively repugnant. Here, the two statutes can be read together in a manner that gives both effect: The amendments to the Wreck Act give the government an *in personam* claim against the vessel owner, which, like numerous other claims against a vessel owner, is subject to limitation under 46 U.S.C. §183(a) in appropriate circumstances. This harmonious coexistence will not thwart the purposes of the Wreck Act, since, as a practical matter, limitation will only impact those Wreck Act claims in which the owner of the wreck was without privity or knowledge.

For these reasons, Petitioner, Southern Scrap, should be allowed to maintain its limitation action against all claims, including the United States' Wreck Act claim. This Court should grant a writ of *certiorari* to correct the Fifth Circuit's error on this important federal maritime issue.

**1. The Fifth Circuit improperly disregarded the underlying rationale and logic of this Court's decision in *Wyandotte*, and the distinctions between the present case and its prior decision in *University of Texas*.**

Prior to 1986, non-negligent shipowners faced no personal liability under the Wreck Act and, therefore, had no need to petition for limitation. But the Wreck Act was amended in 1986, and the government now maintains that even non-negligent shipowners are liable for the cost of wreck removal, without the right to limit their liability under 46 U.S.C. §183(a) (now 46 U.S.C. §30505). The present case is the first since 1986 to consider whether the Wreck Act now imposes strict liability, and whether a non-negligent shipowner should be denied limitation as to a Wreck Act claim. As noted, the Fifth Circuit answered "yes" to both questions, even where, as here, the government's negligence allegedly caused the wreck. But the rationale of this Court's prior jurisprudence strongly argues that the Fifth Circuit erred, and that limitation should not be summarily denied in the present case.

The analysis begins with this Court's decision in *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967), in which this Court held that the government was not limited to an *in rem* recovery against an abandoned vessel under the Wreck Act, but could sue *in personam* those responsible for the sinking. The reason was both sensible and equitable:

> Denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim.

389 U.S. at 204. Notably, however, *Wyandotte* expressly reserved judgment on the specific question of whether the Limitation Act applied to claims under the Wreck Act. *Id.* at 205 n.17.

The Fifth Circuit initially addressed that question in *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438 (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). Relying on the policy arguments used by this Court in *Wyandotte*, the Fifth Circuit held that a negligent shipowner could not limit its liability to the government for the cost of wreck removal. Central to the court's analysis was the *Wyandotte* rationale that a negligent party must not be allowed to shift the consequences of its negligence onto an innocent party:

> To be sure, the [*Wyandotte*] Court relies on these policy arguments only for its recognition that the government is entitled to implied civil remedies. It does not relate those policies directly to the possible application of the Limitation Act. Nevertheless two themes emerge that underlie both inquiries. First, the critical distinction is not between owners of the wreck and non-owners, but between negligent and innocent parties. **The Court is emphatic that the negligent must not**

> **be allowed to shift the loss arising from a sunken vessel onto the innocent.**
>
> . . .
>
> The Wyandotte Court was powerfully moved by the equities of that case. "**There is no indication anywhere . . . that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility.**" 389 U.S. at 200, 88 S.Ct. at 385.

*University of Texas*, 557 F.2d at 446 (emphasis added). Because limitation would allow a negligent shipowner to shift the cost of wreck removal to an innocent party, the government, limitation was inconsistent with the purpose of the Wreck Act in that specific factual situation. *Id.* at 447.

In the present case, the Fifth Circuit relied heavily on its prior decision in *University of Texas*. But, with all due respect, the court overlooked the true import of this Court's decision in *Wyandotte*, and the distinctions between the present case and its prior decision. In *University of Texas*, the Fifth Circuit recognized that this Court in *Wyandotte* had expressly rejected a technical interpretation of the Wreck Act in favor of the policy arguments and equities underlying that statute, and also the Limitation Act:

> Although the holding of the Court in Wyandotte leaves the applicability of the Limitation Act an open question, the policy

> arguments by which the Court reached its holding help answer that question.

*University of Texas,* 557 F.2d at 446. The court continued that "we need carefully to examine the policy arguments deployed by the [*Wyandotte*] Court . . . " and that "the Wyandotte Court was powerfully moved by the equities of that case." 557 F.2d at 446.

Indeed, even a cursory reading of *Wyandotte,* as well as the Fifth Circuit's opinion in *University of Texas,* reveals that policy and equity, rather than a rigid adherence to the specific language of the Wreck Act, was paramount in the courts' rationale. This Court could not have decided *Wyandotte* the way it did based on the language of the Wreck Act, since the remedy recognized in *Wyandotte* was not in the language of the Wreck Act at that time. Thus, the sensible and equitable rationale that the negligent should not be allowed to shift the consequences of their negligence onto the innocent prevailed over a rigid, narrow interpretation of the statutory language in both *Wyandotte* and *University of Texas.*

Unfortunately, the Fifth Circuit in the present case disregarded the same policy considerations and equities that drove the decisions in *Wyandotte* and *University of Texas* and, instead, applied a rigid, doctrinaire interpretation of the Wreck Act amendments. Those policy arguments and equities argue strongly against stripping innocent vessel owners, like Southern Scrap, of their statutory limitation rights in this instance. Southern Scrap should not be

denied the protections of the Limitation Act as to the Wreck Act claim of the party whose negligence caused this loss, the United States Army Corps of Engineers. The Fifth Circuit's decision in the present case contravened both the spirit and the logic of *Wyandotte*. This Court should grant a writ of *certiorari* to correct that error.

**2. The Fifth Circuit improperly concluded that the Wreck Act, as amended, and the Limitation Act are irreconcilably in conflict such that the Limitation Act cannot apply to a claim for wreck removal expenses under the Wreck Act.**

When both *Wyandotte* and *University of Texas* were decided, only negligent shipowners could be liable for wreck removal expenses under the Wreck Act. It was, therefore, unnecessary to decide whether a non-negligent shipowner should be denied limitation as to a Wreck Act claim. In 1986, however, Congress amended §409 of the Wreck Act. The Fifth Circuit held that those amendments removed the negligence requirement, and that all vessel owners are strictly liable for wreck removal costs, no matter whose fault caused the wreck. The court further held that the Wreck Act, as amended, could not be reconciled with the Limitation Act, and that even an innocent shipowner should be denied limitation as to a Wreck Act claim.

The Fifth Circuit's conclusion that the Wreck Act repealed and/or amended the Limitation Act was

legally erroneous. It is axiomatic that a later statute will be considered to have repealed by implication an earlier statute only when the two are irreconcilable. *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l., Inc.*, 534 U.S. 124, 141 (2001), quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1970). Repeals by implication are disfavored, and the intent of the legislature to repeal a prior statute must be "clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981), quoting *Morton v. Mancari*, *supra*, and *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (quoting *Red Rock v. Henry*, 106 U.S. 596, 602 (1883)). This is particularly true with respect to repeal by implication of an express statutory text, as "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *United States v. Fausto*, 484 U.S. 439, 453 (1988), citing *Morton v. Mancari*, *supra*. Thus, when two statutes apply, both must be given effect if at all possible. *Watt*, *supra*.

The Fifth Circuit held in the present case, as it had previously in *University of Texas*, that the Wreck Act necessarily repealed and/or amended the Limitation Act by implication. This asserted modification of the express statutory text of the Limitation Act cannot be justified. Neither the imprecise language of the Wreck Act, as amended, nor the scant legislative history surrounding the 1986 amendments support the conclusion that the Wreck Act now imposes not only strict liability, but unlimited and unlimitable liability for wreck removal expenses on an innocent shipowner.

The 1986 amendments to the Wreck Act deleted the words "voluntarily or carelessly" from the original text of §409, leaving the amended text to read that it is unlawful "to sink, or permit or cause to be sunk," a vessel in a navigable channel. The 1986 amendments also added §§414(b) and 415(c), which provide the government a right of action against the owner of a wreck for the cost of wreck removal. Petitioner concedes these amendments must be given effect, and that they created an *in personam* right of action that the statute did not previously contain, thus codifying this Court's holding in *Wyandotte*. But, even as amended, §409 still requires some affirmative causative act to impose liability: The shipowner must "sink, or permit or cause to be sunk," its vessel. This causation requirement corresponds to the Limitation Act's requirement that the loss be "done, occasioned, or incurred" – i.e., caused – without the owner's privity or knowledge. Southern Scrap did not "sink, or permit or cause to be sunk" its drydock and, therefore, cannot be liable for the government's wreck removal claim even under the amendments to the Wreck Act.

But the paramount issue at the present stage is whether Wreck Act liability is subject to an otherwise viable statutory right of limitation under the Limitation Act. There is nothing in the language of the Wreck Act, as amended, or its legislative history to support the conclusion that Wreck Act liability is unlimitable. The mere creation of an *in personam* right of action does not, *per se,* make that claim unlimitable.

The Limitation Act, 46 U.S.C. §183(a), is specifically available to limit "any" vessel owner's *in personam* liability in "any" action when the damage occurred without the privity or knowledge of the owner:

> The liability of the owner of **any** vessel . . . for **any** loss, damage or injury by collision, or for **any** act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. §183(a) (emphasis added). To be sure, the Limitation Act has been much criticized. But it is still the law. And the perceived unfairness of limitation is no more pronounced in a Wreck Act claim than in any other situation in which a vessel owner may limit its liability to less than the claimants' damages. Indeed, if, as held below, the 1986 amendments impose strict liability for wreck removal expenses even on an innocent shipowner, the argument for allowing limitation in that situation is strong and compelling.

More to the point, any changes to the Limitation Act or the rights it creates must be made by Congress. Congress has had numerous opportunities to expressly repeal or limit shipowners' limitation rights and has chosen not to do so. To the contrary, Congress recently recodified the Limitation Act as part of its comprehensive recodification of Title 46 of the United States Code, without any significant substantive

changes. 46 U.S.C. §30505. Thus, Congress has continued to retain limitation as a viable statutory right.

Congress could also have specifically addressed the right to limitation of Wreck Act claims when it amended the Wreck Act in 1986. Again, it chose not to do so. Its failure to do so, combined with the scant legislative history surrounding the 1986 amendments, precludes a finding that Congress clearly and manifestly intended to repeal or modify the Limitation Act with respect to Wreck Act claims.

Nor does giving effect to the Limitation Act nullify or thwart the Wreck Act, as amended in 1986. Allowing limitation as to Wreck Act claims will, as a practical matter, impact only those cases when, as here, a truly innocent vessel owner did not cause, and could not reasonably have prevented, the wreck, leaving the 1986 Wreck Act amendments fully effective as to all other claims.

Moreover, the Fifth Circuit's interpretation of the Limitation Act overlooks that Act's original intent. The Fifth Circuit noted that the impetus behind the Limitation Act in 1851 was to encourage investment in United States shipping by providing the same limitation rights then allowed in Great Britain. App. 24, citing *University of Texas,* 557 F.2d at 454. Ironically, however, when the Wreck Act was amended in 1986, Great Britain permitted limitation of liability as to wreck removal claims. The United Kingdom is a signatory to the Convention on Limitation of Liability

for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221, which, at Article 2, Section 1(d), provides for limitation of wreck removal claims.[2] See, also, *University of Texas,* 557 F.2d at 454 n.27. Thus, the Fifth Circuit's decision in the present case, like its prior decision in *University of Texas,* undermines the intent behind the Limitation Act of placing United States shipping on the same footing as that of Great Britain.

In short, if Congress wished to repeal or limit the Limitation Act, it could have, and would have, done so. Neither the amended language of the Wreck Act, nor the sparse legislative history surrounding the 1986 amendments, supports the conclusion that Congress intended to preclude statutory limitation of Wreck Act claims. As noted above, to deny limitation would contravene the very principles that this Court held paramount in *Wyandotte*, and would create the intolerable situation, "extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim." 389 U.S. at 204. There is simply nothing in the Wreck Act, as amended, clearly and manifestly establishing that Congress intended to preclude an innocent shipowner defending a Wreck Act claim from seeking the protection of the Limitation Act. The Fifth Circuit therefore erred in holding that the United States' Wreck Act

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[2] The 1976 Convention can be found at http://www.admiraltylawguide.com. The United Kingdom is one of 41 countries who have signed the 1976 Convention and allow limitation of wreck removal claims.

claim can be asserted outside of Southern Scrap's limitation action.

## CONCLUSION

The present issue is *res nova*; prior jurisprudence is inapposite but instructive. The Wreck Act and the Limitation Act have been construed so that the negligent party is not allowed to shift the costs of wreck removal required by its negligence onto an innocent party. Petitioner, Southern Scrap, an innocent shipowner, should not be denied the protections of the Limitation Act against the Wreck Act claim of the Corps, whose negligence wrecked Southern Scrap's drydock. As this Court recognized long ago, to allow a negligent party to shift the cost of wreck removal resulting from its negligence onto an innocent party would be intolerable. That rationale flows both ways: The fair, reasonable and common sense conciliation of the Wreck Act and the Limitation Act requires that an innocent vessel owner should not be denied the protections of the Limitation Act, particularly when, as here, the government's negligence caused the wreck.

The 1986 amendments to the Wreck Act did not clearly and manifestly express Congressional intent to repeal or modify by implication the statutory limitation rights afforded shipowners under 46 U.S.C. §183(a). Neither the language of the Wreck Act, nor

the sparse history underlying the 1986 amendments, nor the perceived purpose of those amendments establish that the *in personam* right of action afforded under the Wreck Act was unlimited and unlimitable. Like numerous other *in personam* claims against a vessel owner, Wreck Act claims should be subject to limitation in those instances where limitation is appropriate.

In the present case, limitation is not only legally viable, but entirely just. There is nothing Southern Scrap could have done to protect its drydock from Hurricane Katrina's storm surge, which was magnified by the government's negligence in the design, construction, engineering and maintenance of the MR-GO. Southern Scrap, an innocent shipowner, should not be stuck with the exorbitant and inflated cost of removing the wreck that resulted from the government's own negligence. Southern Scrap should not, therefore, be deprived of its statutory rights under the Limitation Act, 46 U.S.C. §183(a).

The Fifth Circuit therefore erred in holding that the United States' Wreck Act claim is not subject to limitation under 46 U.S.C. §183(a). This Court should grant a writ of *certiorari* to review the Fifth Circuit's 25 August 2008 decision and judgment and correct that legal error.

Respectfully submitted,

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**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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No. 07-30470

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In Re: In the Matter of: SOUTHERN SCRAP MATERIAL COMPANY LLC, As owner of the Southern Scrap Drydock, in a cause of Exoneration from or Limitation of Liability

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SOUTHERN SCRAP MATERIAL COMPANY LLC, as owner of the Southern Scrap Drydock

Petitioner-Appellant

v.

ABC INSURANCE COMPANY

Respondent

UNITED STATES OF AMERICA

Claimant-Appellee

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Appeal from the United States District Court for the Eastern District of Louisiana

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(Filed Aug. 25, 2008)

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Before WIENER, BARKSDALE, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In this interlocutory appeal filed pursuant to 28 U.S.C. § 1292(a)(1), Southern Scrap Material Co., L.L.C. ("Southern Scrap"), contends that the district court erred by entering an order partially lifting and/or modifying the injunction it had previously issued in this limitation of liability action to allow the United States of America (the "United States") to pursue a claim against Southern Scrap outside of the context of the Limitation of Liability Act of 1851 (the "Limitation Act"), 46 App. U.S.C. § 183, revised at 46 U.S.C. § 30505 *et seq.* The United States' claim against Southern Scrap is brought pursuant to the Wreck Act, which is part of the Rivers and Harbors Act of 1899.[1] The United States seeks to hold Southern Scrap personally liable for the full amount of the wreck removal expenses it incurred when it removed Southern Scrap's sunken drydock from the Inner Harbor Navigational Canal (the "Industrial Canal") in New Orleans, Louisiana, after Hurricane Katrina; the cost of this removal far exceeded the post-accident value of the wrecked drydock. The United States asserted during the limitation proceeding that it

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[1] Sections 15, 16, 19 and 20 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 409, 411, 412, 414 and 415) are collectively known as the Wreck Act. *See Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 727 F.2d 455, 457 n.1 (5th Cir. 1984) (en banc).

should be allowed to file its claim as a civil action against Southern Scrap outside of the limitation proceeding because the Limitation Act does not apply to claims brought by the United States under the Wreck Act. Southern Scrap opposed the United States' motion to lift or modify the injunction in the district court, arguing that the Wreck Act does not authorize a statutory action to hold Southern Scrap, as the non-negligent owner of the drydock, personally liable for wreck-removal expenses, and even if it does, Southern Scrap's liability under the Wreck Act is limited by the Limitation Act to the drydock's post-accident value.

The questions presented in this appeal are therefore twofold: (1) whether the United States' claim under the Wreck Act states a claim upon which relief can be granted; and if so, (2) whether the Limitation Act applies so as to limit the United States' recovery on its Wreck Act claim. Viewing the facts alleged in the light most favorable to the United States, as we must at this pleading stage, we conclude that, as a result of the 1986 amendments to the Wreck Act, the United States may bring a statutory action under the Wreck Act to hold Southern Scrap personally liable for the cost of removing its sunken drydock, and that the claim is not subject to the Limitation Act. We therefore AFFIRM the district court's judgment insofar as it is consistent with this opinion. In so holding, we intimate no view as to the ultimate merits of the United States' claim or the defenses or

counterclaims that may be asserted by Southern Scrap against it.

## I. FACTUAL BACKGROUND

The following facts are taken from the allegations of fact contained in the claim filed by the United States in the limitation proceeding. When Hurricane Katrina struck New Orleans, Louisiana, on August 29, 2005, Southern Scrap was the owner and/or operator of a buoyant drydock located at its facility on the Industrial Canal inside the city. Katrina's surge caused the drydock to break free from its moorings and partially sink in the Industrial Canal against the Florida Avenue Bridge fender system.[2] The United States Army Corps of Engineers (the "Corps") considered the sunken drydock to be a hazard to navigation in the heavily-used Industrial Canal, which it considers to be part of the navigable waters of the United States, and, accordingly, determined that it should be removed in order to eliminate the hazard. On September 9, 2005, the Corps allegedly contacted Southern Scrap and advised it that the drydock was a hazard that needed to be removed. The Corps contends that Southern Scrap responded that it did not have the resources to remove the drydock in a timely manner but that it would provide blueprints to facilitate the

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[2] According to Southern Scrap's limitation complaint, the drydock measured 220 feet long by 157 feet wide by 24 feet deep and displaced 3,868 long tons.

drydock's removal. The Corps then hired Boh Bros. Construction Co. ("Boh Bros.") to remove the drydock from the Industrial Canal, and operations commenced on September 18, 2005. Boh Bros. completed removal of the drydock on December 2, 2005.[3] Thereafter, pursuant to 33 U.S.C. § 409, the Corps demanded payment for its removal costs, which it estimated to be about $8,000,000, from Southern Scrap, as the owner and/or operator of the drydock that impeded navigation in the Industrial Canal. To date, Southern Scrap has refused to pay the amount requested by the United States for the cost of removing the drydock from the Industrial Canal.

## II. PROCEDURAL BACKGROUND

On April 11, 2006, Southern Scrap filed a petition for limitation of liability in the Eastern District of Louisiana pursuant to the Limitation Act, by which it sought to limit its liability to the post-accident value of the drydock, which it stipulated to be $316,131.64. That same day, in accordance with the Limitation

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[3] During the pendency of removal operations, two tows struck the drydock while passing through the Industrial Canal. On October 16, 2005, Barge VL-81442, which was being towed by the M/V WENDY C, struck the drydock and sustained damage. On November 9, 2005, MMI 3019, a tank barge which was being towed by the M/V BETHESDA, struck the drydock and sustained damage. The owners of both vessels have filed claims against Southern Scrap, but their claims are not relevant to the issues presently before the Court on this interlocutory appeal.

Act, the district court issued an order restraining the filing, commencement, and further prosecution of any legal proceedings against Southern Scrap arising out of the sinking of its drydock outside of the limitation action. The district court's order also required any party with a claim against Southern Scrap based on the damage or costs caused by the sunken drydock to file that claim as part of the limitation action by July 14, 2006. Five parties did so, including the United States, which filed its claim pursuant to the Wreck Act.

On December 22, 2006, the United States filed a motion asking the district court to lift or modify its April 11, 2006 limitation order so that the United States could pursue its claim for the entirety of its wreck removal expenses under the Wreck Act against Southern Scrap outside of the context of the limitation proceeding. On April 26, 2007, the district court granted the United States' motion, thereby allowing it to bring an unlimited personal liability claim under the Wreck Act outside of the context of the limitation proceeding against Southern Scrap for the entirety of the wreck removal expenses. Southern Scrap then timely filed this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1). *See Complaint of Mucho K, Inc.*, 578 F.2d 1156, 1157 (5th Cir. 1978) (holding that the modification or dissolution of an injunction in a limitation of liability proceeding is appealable as a matter of right under § 1292(a)(1)).

## III. STANDARD OF REVIEW

Because we must decide whether the United States is able to state a claim under the Wreck Act in order to resolve whether the district court properly granted the United States' motion to lift or modify the injunction in the limitation proceeding, we treat this matter as if it comes to us in the form of a denial of a Rule 12(b)(6) motion brought by Southern Scrap. We review a district court's determination of a Rule 12(b)(6) motion *de novo*. *Abraham v. Singh,* 480 F.3d 351, 354 (5th Cir. 2007). When reviewing a motion to dismiss, we must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir. 1996). As the Supreme Court recently emphasized, the "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" and the non-moving party must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965, 1974 (2007). This standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the necessary claims or elements. *Id.* at 1965.

Furthermore, this Court reviews a district court's statutory construction *de novo*. *See Kaluom v. Stolt Offshore, Inc.,* 504 F.3d 511, 514 (5th Cir. 2007); *see also Kemp v. G.D. Searle & Co.,* 103 F.3d 405, 407

(5th Cir. 1997) ("Questions of statutory interpretation are questions of law and thus reviewed de novo.").

## IV. DISCUSSION

### A. The United States has sufficiently alleged a claim against Southern Scrap upon which relief can be granted under the Wreck Act.

The Rivers and Harbors Act, "an assertion of the sovereign power of the United States" over its navigable waterways pursuant to Article I, § 8 of the Constitution, "was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Transp. Co. v. United States,* 389 U.S. 191, 201 (1967). The Supreme Court has "consistently found [the Rivers and Harbors Act's] coverage to be broad," and it has "found that a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself." *Id.* at 201. The Wreck Act, which is comprised of certain provisions of the Rivers and Harbors Act, *viz.,* 33 U.S.C. §§ 409, 411, 412, 414 and 415, "addresses the problem of obstructions caused by sunken vessels." *Univ. of Texas Med. Branch at Galveston v. United States,* 557 F.2d 438, 444 (5th Cir. 1977). Its purpose is "the protection of other vessels plying the same waters" as the sunken vessels. *United States v. Raven,* 500 F.2d 728, 732 (5th Cir. 1974). "Congress sought to ensure that navigable waterways remained free of obstructions, including sunken vessels." *Univ. of Texas Med. Branch at Galveston,* 557 F.2d at 441. Three sections of the Wreck Act are relevant to this case: 33 U.S.C. § 409; 33 U.S.C. § 414; and 33 U.S.C. § 415.

Section 409 specifically addresses the problem of obstructions to navigable waterways caused by sunken vessels.[4] The Supreme Court and this Court have construed § 409 as having three separately operative clauses.[5] The first clause prohibits the sinking, or permitting or causing the sinking, of vessels or other craft in navigable channels. The second clause provides that the owner, lessee, or operator of a vessel sunken in a navigable channel must mark it with a buoy or beacon by day and a light at night. The third clause provides that the owner,

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[4] Section 409, in pertinent part, provides:

> It shall not be lawful . . . to sink, or permit or cause to be sunk, vessels or other craft in navigable channels. . . . And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, it shall be the duty of the owner, lessee, or operator of such sunken craft to immediately mark it with a buoy or beacon during the day and . . . a light at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner, lessee, or operator so to do shall be unlawful; and it shall be the duty of the owner, lessee, or operator of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

33 U.S.C. § 409.

[5] *See Wyandotte,* 389 U.S. at 206-07; *Univ. of Texas Med. Branch at Galveston,* 557 F.2d at 444; *see also Nunley,* 727 F.2d at 459; *Tenn. Valley Sand & Gravel Co. v. M/V Delta,* 598 F.2d 930, 934 (5th Cir. 1979).

lessee, or operator of a vessel sunken in a navigable channel shall commence the immediate removal of the vessel and prosecute the removal diligently, or else be considered as having abandoned the vessel, subjecting it to removal by the United States as provided for in 33 U.S.C. §§ 414 and 415, *inter alios*.[6]

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[6] Prior to 1986, § 409 read:

> It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels. . . . And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title.

*Wyandotte*, 389 U.S. at 197 (quoting the pre-1986 version of 33 U.S.C. § 409).

Congress amended the Wreck Act in 1986. As part of those amendments, Congress removed the words "voluntarily or carelessly" from the first sentence of § 409, so that it now reads simply "or to sink, or permit or cause to be sunk. "*See* Water Resources Development Act of 1986, H.R. 6, 99th Cong. § 939(a) (1986). Congress also omitted the words "accidentally or otherwise" from the second sentence of § 409, and inserted ", lessee, or operator" after each place "owner" appears in the statute. *Id.*

Sections 414[7] and 415[8] expressly authorize the government to remove vessels sunken in navigable

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[7] The current version of § 414 reads in full:

(a) Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided,* That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also,* That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided,* That such bidder shall give

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satisfactory security to execute the work: *Provided further,* That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States.

(b) The owner, lessee, or operator of such vessel, boat, watercraft, raft, or other obstruction as described in this section shall be liable to the United States for the cost of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a) of this section. Any amount recovered from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

[8] The current version of § 415 reads, in pertinent part:

(a) Removal authority. Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused . . . *provided further,* That the actual expense, including administrative expenses, of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer

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waterways and to recover removal costs when the owner, lessee, or operator fails to prosecute immediate removal diligently as required by the third clause of § 409. Section 414(a) provides that whenever a navigable waterway has been obstructed by a sunken vessel for more than 30 days, or when the abandonment of the obstruction is legally established, the Secretary of the Army may have the obstructing vessel broken up, removed, sold, or otherwise disposed of. Section 415(a) is similar to § 414(a), except that it authorizes the United States through the Secretary of the Army, in an emergency, to take immediate possession of a sunken vessel that stops, seriously interferes with, or specially endangers navigation in any navigable waterway of the United States, and to remove or destroy such sunken vessel so as to eliminate the obstruction.

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or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

(b) Removal requirement. . . .

(c) Liability of owner, lessee, or operator. The owner, lessee, or operator of such vessel, boat, watercraft, raft, or other obstruction as described in this section shall be liable to the United States for the actual cost, including administrative costs, of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a) of this section. Any amount recovered from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

Section 414(b) provides that the owner, lessee, or operator of a sunken vessel removed from a navigable waterway pursuant to § 414(a) by the government "shall be liable to the United States for the cost of removal or destruction and disposal" of the vessel as provided for in § 414(a). Section 415(c)[9] similarly provides that the owner, lessee, or operator of a sunken vessel shall be liable to the government for the costs of removal on an emergency basis under § 415(a), except that in such case the removal costs shall include administrative expenses.

Applying the foregoing statutory provisions to the facts alleged by the United States in this case, we conclude that the government can state a claim upon which relief may be granted to it under the third clause of § 409 when read together with § 414(a) & (b) (or § 415(a) & (c)).

Specifically, the United States alleges that Southern Scrap was the owner and operator of a drydock that, by virtue of its being swept away and sunken by Hurricane Katrina, became a significant

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[9] In 1996, Congress amended § 415(b) by re-designating this provision as § 415(c) and by striking "cost" and inserting "actual cost, including administrative costs." *See* Water Resources Development Act of 1996, S. 640, 104th Cong. § 218(b) (1996). The new provision that was added in 1996, now codified at 33 U.S.C. § 415(b), has no relevance to the present case. It provides for the duties of a vessel owner and the Secretary of the Army when the Coast Guard issues an order to stop or delay navigation in any navigable waters because of conditions related to the sinking or grounding of a vessel.

hazard to navigation in the Industrial Canal, one of the country's navigable waterways, and that the drydock was a sunken vessel, which under federal law had to be removed from the Industrial Canal in order to eliminate its hazard to navigation. The United States further alleges that, upon contacting representatives of Southern Scrap less than two weeks after Hurricane Katrina struck, it was advised that Southern Scrap was unable to remove its drydock from the Industrial Canal in a timely manner. Moreover, the United States alleges that, in the opinion of the Corps the drydock's obstruction stopped, seriously interfered with, or specially endangered navigation; and that the Secretary duly exercised his discretion to have the sunken vessel removed from the channel. Consequently, the United States avers, the Corps proceeded to have the sunken drydock removed for a cost of over $7 million, which greatly exceeds the value of the wrecked drydock. Accordingly, the United States alleges, Southern Scrap, as owner of the removed vessel, is liable to the United States for the cost of the sunken vessel's removal or destruction and disposal.

The foregoing facts alleged by the United States are sufficient to state the essential elements of a claim under § 409 of the Wreck Act, *viz.*, that Southern Scrap's vessel was wrecked and sunk in a navigable channel; that it was Southern Scrap's duty as its owner to commence the immediate removal of the same; that Southern Scrap failed to do so and thereby abandoned the craft and subjected it to removal by

the United States as provided for in §§ 414 and 415 of the Wreck Act; that the government removed the sunken drydock from the navigable channel in accordance with these statutory provisions; and that Southern Scrap as owner and operator of the sunken drydock is liable to the United States for the cost of removal or destruction and disposal of that vessel.

Contrary to our interpretation of the foregoing statutory provisions, however, Southern Scrap contends that the Wreck Act affords the government the right to recover removal costs only in the event the owner, lessee, or operator of a vessel negligently causes it to sink in a navigable waterway. This follows, Southern Scrap argues, because the object of the 1986 amendments was merely to codify the Supreme Court's decision in *Wyandotte Transp. Co. v. United States* holding vessel owners liable for the government's costs in removing their negligently caused wrecks, not to enable the United States to recover its full expenses of wreck removal from non-negligent vessel owners, lessees, and operators. We cannot agree. Southern Scrap's interpretation of the current statute cannot be squared with the plain words of the 1986 amendments, the evident objects of the amendments, and the basic structure and scheme of the Wreck Act left intact by them.

As originally enacted, the first clause of § 409 of the Wreck Act prohibited "voluntarily or carelessly" sinking a vessel in a navigable channel. Based on that language, the Supreme Court in *Wyandotte* held that the United States could recover its costs of

removing such wrecks from those channels from persons who negligently sank them. If Congress in the 1986 amendments had intended merely to codify *Wyandotte* and restrict the United States to that negligence cause of action, it would have preserved the terms "voluntarily or carelessly" and probably would have elaborated upon the negligence theory in the first clause of § 409 or elsewhere in the statute. The 1986 amendments, however, took a tack away from negligence theory by deleting the words "voluntarily or carelessly" from the first clause of § 409 and by amending and affecting other provisions of the Wreck Act so as to expand the potential for vessel owners' liability without fault for governmental wreck removal costs.

The third clause of § 409, unlike the first clause, has always imposed a direct duty on non-negligent owners whose vessels sank in navigable channels to remove them or else risk the consequence of having the government remove them as provided for in §§ 414 and 415 of the Wreck Act.[10] Originally, §§ 414 and 415 only imposed upon such owners *in rem* liability for the government's removal costs up to the value of the wrecked vessel and its cargo. But in the 1986 legislation, §§ 414 and 415 were amended to provide that the owners, lessees, and operators of vessels sunken in navigable channels shall be liable

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[10] The 1986 amendments did not alter the structure, scheme, or nature of the third clause of § 409.

to the United States for its costs in removing such sunken vessels that exceed the *in rem* value of the wreck. In other words, the 1986 legislation, in essence, amended §§ 414 and 415 of the Wreck Act to provide that, in addition to a sunken vessel owner's former *in rem* liability under those sections, an owner, lessee, and operator shall also be liable to the United States for the actual cost of a wreck removal which exceeds the *in rem* value of the wreck.

For these reasons, we conclude that the 1986 amendments to the Wreck Act were not designed to codify *Wyandotte* or the negligence cause of action it discovered in the Act as Southern Scrap contends, but were intended to grant the United States the substantive statutory right to hold vessel owners, lessees, and operators personally liable for the government's removal costs when they fail to comply with their duty to remove sunken vessels from navigable waters under § 409 of the Act.[11] Accordingly, we

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[11] The legislative history of the 1986 amendments to the Wreck Act and the Corps's implementing regulations relating to those amendments support this conclusion. When the Senate passed the 1986 amendments, the Senate Report explained that "[u]nder present law, Corps costs for removal can only be offset by the salvage value of the wreck. In the case of abandoned vessels, this is usually far less than the cost of removal." S. REP. No. 99-126, at 26 (1985). Under the new amendments, according to the Senate, "*any* owner or operator of a vessel *must* reimburse the United States for expenses covering its salvage, if wrecked." *Id.* (emphasis added). Likewise, the Corps has interpreted the 1986 amendments to mean that "[t]he abandonment of a wreck or other obstruction does not remove the owner's liability for the

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also conclude that the United States can state a personal liability claim against Southern Scrap under the Wreck Act for the recovery of its actual cost of removing the drydock from the Industrial Canal without alleging that the vessel owner negligently caused the sinking.

### B. The Limitation Act does not apply to limit the United States' recovery of wreck removal costs under the Wreck Act.

This Court in *University of Texas* held that the Limitation Act[12] did not apply to the United States' civil suit under § 409 of the Wreck Act for wreck-removal expenses against parties negligently responsible for the wreck. 557 F.2d at 452. While the *University of Texas* Court was not called upon to address

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cost of removal and disposal if removal is undertaken by the Corps of Engineers, except in cases of nonnegligent sinking which occurred prior to November 17, 1986." 33 C.F.R. § 245.45(f).

[12] The Limitation Act provides in pertinent part:

> The liability of the owner of any vessel, whether American or foreign, for any . . . loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not (except in cases of personal injury) . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 App. U.S.C. § 183, revised at 46 U.S.C. § 30505 *et seq.*

the impact of the Limitation Act in the context of a non-negligent sinking – and of course was decided under the pre-1986 version of the Wreck Act – its underlying principles when combined with the plain words and evident objects of the 1986 amendments compel us to conclude again that the Limitation Act does not apply to limit the United States' recovery under the Wreck Act in this case.[13]

First, Congress made a clear policy choice in the 1986 amendments to supersede with unlimited personal liability the *in rem* liability limitation that vessel owners had enjoyed under the previous versions of §§ 414 and 415 of the Wreck Act. Thus, it is very unlikely that Congress intended for vessel owners to be able to cancel out this legislative decision by relying on the similar *in rem* protection of the 1851 Limitation Act. Permitting Southern Scrap to invoke the Limitation Act in this case would nullify the effect of the new §§ 414(b) and 415(c), which we have determined impose unlimited personal liability upon a vessel owner for governmental removal costs, when the owner fails to comply with its obligation to remove its sunken vessel from a navigable waterway. *See In re Transporter Marine, Inc.*, 217 F.3d 335, 338

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[13] We note that on another occasion, in *United States v. Nassau Marine Corp.*, 778 F.2d 1111, 1114 (5th Cir. 1985), this Court stated in dicta that "non-negligent shipowners may be entitled to limit their liability under [the Limitation Act]." We of course are not bound by dicta, and in any event *Nassau Marine* was decided before the enactment of the 1986 amendments to the Wreck Act.

(5th Cir. 2000) (explaining that Wreck Act claims arise "from statutory authority creating an independent statutory duty on the part of the shipowner" and that to subject such claims to limitation "would thwart the expressed intent of Congress – removal of sunken vessels that are hazards to navigation"); *cf. Univ. of Texas Med. Branch at Galveston*, 557 F.2d at 453 (disallowing application of the Limitation Act there because it "would merely reinstate at another level the limitation on a negligent party's liability that *Wyandotte* had removed by authorizing an *in personam* suit").

Second, in concluding that the Wreck Act "implicitly limits the scope of the Limitation Act," 557 F.2d at 452, the *University of Texas* Court applied the longstanding principle that when two statutes irreconcilably conflict, the more recent statute controls. *Id.* at 455 ("This is not to say that the Limitation Act no longer has any vitality. It is rather to say that its force succumbs to that of a later statutory enactment which, when still later construed by the Supreme Court in a manner that wars with the policies of the Limitation Act, must prevail over the earlier Act.").[14] Under the pre-1986 version of the

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[14] *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled.") (quotations and citations omitted); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal,

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Wreck Act, the conflict, or "wide breach," as the *University of Texas* Court called it, between the 1899 Wreck Act and 1851 Limitation Act arose from *Wyandotte*'s determination that "the United States could sue the negligent owner personally for wreck removal expenses even though the latter had abandoned his vessel." *Id.* at 451.[15] Thus, the *University of Texas* Court found that "[i]n order fully to effectuate the policies of the [Wreck Act] as interpreted by the Supreme Court in *Wyandotte,* then, it is impossible to give full effect to the Limitation Act." *Id.*; *see also In re Chinese Mar. Trust, Ltd.,* 478 F.2d 1357, 1359 (2d Cir. 1973) ("The [Limitation] Act must be construed, however, in the light of subsequently enacted legislation and regulations designed to insure that our country's navigable waterways will be kept free of obstructions."). Following the 1986 amendments, the conflict between the two statutes is even more

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the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); *I.C.C. v. S. Ry. Co.,* 543 F.2d 534, 539 (5th Cir. 1976) ("Under the usual rules of statutory construction, where there is a conflict between an earlier statute and a subsequent enactment, the subsequent enactment governs."); *see also United States v. Lara,* 181 F.3d 183, 198 (1st Cir. 1999) ("Courts generally adhere to the principle that statutes relating to the same subject matter should be construed harmoniously if possible, and if not, that more recent or specific statutes should prevail over older or more general ones.").

[15] Prior to *Wyandotte,* this Court explained that "[i]t was possible to find [the Wreck Act and Limitation Act] consistent and, indeed, complementary as long as the shipowner was able effectively to limit his liability merely by abandoning his vessel." *Univ. of Texas Med. Branch at Galveston,* 557 F.2d at 451.

pronounced, for the non-negligent owner is no longer able to automatically limit his liability under either §§ 414 or 415 simply by abandoning his vessel. Rather, the new §§ 414(b) and 415(c) now permit the United States to hold a non-negligent vessel owner personally liable for the total amount of governmental wreck removal costs when it fails to remove its sunken vessel as required by the third clause of § 409. By contrast, "the language of the Limitation Act provides for a limitation on the total of all recoverable damages in a marine accident to the post-accident value of the ship and its cargo, no matter how many claimants there may be." *Tug ALLIE-B, Inc. v. United States,* 273 F.3d 936, 942 (11th Cir. 2001) (citing 46 U.S.C. app. § 183(a)). Clearly, then, the two statutes irreconcilably conflict in respect to the nature and scope of a vessel owner's liability when the United States sues to recover wreck removal costs. Were we to hold otherwise, *i.e.,* that the United States' right to recover such costs expressly set forth in §§ 414(b) and 415(c) can still be limited by the owner of a sunken vessel under the Limitation Act, we would effectively render the new clauses meaningless, thereby "violat[ing] the canon of statutory construction that discourages courts from adopting a reading of a statute that renders any part of the statute mere surplusage." *Id.* at 944 (citing *Bailey v. United States,* 516 U.S. 137, 146 (1995)).[16]

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[16] In addition to the Wreck Act, courts have found that other later-enacted statutes impliedly repealed the Limitation Act for

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Finally, this Court in *University of Texas* persuasively explained, through detailed reference to the legislative history of the Limitation Act, why that Act should not be extended to cases involving the United States' recovery of wreck removal expenses pursuant to the Wreck Act. *See Univ. of Texas Med. Branch at Galveston,* 557 F.2d at 454-55. We noted that the stated purpose of the Limitation Act "was to place this country's 'mercantile marine upon the same footing as that of Great Britain.'" *Id.* at 454 (quoting 23 Cong. Globe, 31st Cong., 2d Sess. 714 (Remarks of Sen. Davis, February 26, 1851)). Yet, "throughout the nineteenth century and, indeed, until recently, the law of Great Britain has been that the limitation of liability afforded shipowners does not extend to shipowners' liability for wreck removal expenses." *Id.* Accordingly, we concluded that "it is doubtful that Congress, in 1851 or in 1899, specifically intended the

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cases arising under those statutes. *See Tug ALLIE-B,* 273 F.3d at 948-49 (holding that the Limitation Act does not apply to claims brought under the Park System Resource Protection Act); *Complaint of Metlife Capital Corp.,* 132 F.3d 818, 822 (1st Cir. 1997) (holding that the Limitation Act does not apply to claims brought under the Oil Pollution Act); *In re The Glacier Bay,* 944 F.2d 577, 583 (9th Cir. 1991) (holding that the Limitation Act does not apply to claims brought under the Trans-Alaska Pipeline Authorization Act); *United States v. CF Indus., Inc.,* 542 F.Supp. 952, 955-56 (D. Minn. 1982) (holding that the Limitation Act does not apply to claims brought under the Clean Water Act); *cf. Transporter Marine,* 217 F.3d at 339-40 (holding that Coast Guard alcohol and drug regulations are not subject to the Limitation Act).

Limitation Act to apply where its English counterpart did not." *Id.* at 454-55.

For these reasons, we conclude, as we did in *University of Texas,* that in this case "the Limitation Act does not wreck the Wreck Act and the Wreck Act is not limited by the Limitation Act." *Id.* at 455.

## V. CONCLUSION

Accordingly, the judgment of the district court lifting and modifying its injunction so as to allow the United States to bring its personal liability claim against Southern Scrap for the recovery of its actual costs in removing Southern Scrap's drydock from the navigable waters of the Industrial Canal, without alleging that the vessel owner negligently caused the sinking, is AFFIRMED insofar as it is consistent with the foregoing opinion.

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 07-30470

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D.C. Docket No. 2:06-CV-1860 F

In Re: In the Matter of: SOUTHERN SCRAP MATERIAL COMPANY LLC, As owner of the Southern Scrap Drydock, in a cause of Exoneration from, or Limitation of Liability

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SOUTHERN SCRAP MATERIAL COMPANY LLC, as owner of the Southern Scrap Drydock

Petitioner-Appellant

v.

ABC INSURANCE COMPANY

Respondent

UNITED STATES OF AMERICA

Claimant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans.

(Filed Aug. 25, 2008)

Before WIENER, BARKSDALE, and DENNIS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: OCT 17 2008

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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| IN THE MATTER OF SOUTHERN SCRAP MATERIAL CO., L.L.C., AS OWNER OF THE SOUTHERN SCRAP DRYDOCK IN A CAUSE OF EXONERATION FROM OR LIMITATION OF LIABILITY | * * * * * * | CIVIL ACTION NO. 06-1860 SECTION "F" (Filed Apr. 26, 2007) |

ORDER AND REASONS

Before the Court is the government's motion to lift or modify this Court's previous Order directing issuance of notice and restraining prosecution of claims. For the reasons that follow, the motion is GRANTED.

**Background**

On August 29, 2005, when Hurricane Katrina struck New Orleans, a drydock owned by Southern Scrap Material Co., L.L.C. broke free from its moorings on Southern Scrap's facility on the Industrial Canal, crossed the Industrial Canal, and partially sank near the northwest fendering system of the Florida Avenue Bridge.[1] The government considered

[1] In July 2005, the drydock was towed from Ingalls Shipyard in Pascagoula, Mississippi to Southern Scrap's facility on the Industrial Canal, where it was secured by lines and wire

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the sunken drydock a hazard to navigation and determined that it had to be removed.

On September 18, 2005, the Army Corps of Engineers undertook to remove the drydock; Boh Brothers was hired and removal was completed on December 2, 2005.[2] The Corps submitted a claim to Southern Scrap for the $8 million in removal costs.

On April 11, 2006, Southern Scrap filed this limitation proceeding, seeking to limit its liability to the post-casualty value of the drydock.[3] In accordance with the Limitation of Liability Act, the Court granted Southern Scrap's request to restrain the filing, commencement and further prosecution of all legal proceedings against Southern Scrap based on the drydock breakaway. Several claims have been filed; only the United States seeks exclusion.

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cables to the shore. The drydock was 220 feet long by 157 feet wide by 24 feet deep and displaced 3868 tons.

[2] The United States maintains that the Corps asked Southern Scrap to remove the drydock and that Southern Scrap said it would not be able to do so, but that it would provide blueprints to facilitate in the drydock's removal. Southern Scrap says the Corps never asked Southern Scrap to remove its sunken drydock but, rather, that the United States removed it without allowing Southern Scrap to do it.

[3] Southern Scrap alleges that the drydock was a vessel, that Southern Scrap was not responsible for the breakaway because it had not acted negligently, and that it anticipated that claims would exceed the post-accident value of the drydock ($316,:131.64).

The government now moves for an order lifting the stay of all actions arising out of the drydock breakaway so that it may pursue its damages claim in an *in personam* action against Southern Scrap. It asserts an exclusion from the limitation proceeding by virtue of the Wreck Act.

I.

The Wreck Act, which is part of the Rivers and Harbors Act, authorizes the United States to remove wrecks from its navigable waters. Section 409 of title 33 of the United States Code[4] provides that:

> It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to sink, or permit or cause to be sunk, vessels or other craft in navigable channels. . . . And, whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, it shall be the duty of the owner, lessee, or operator of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is

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[4] This provision is referred to as "section 15" of the Rivers and Harbors Act. *See, e.g., Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 196-97 (1967); *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 441 n.1 (5th Cir. 1977) ("Sections 15, 16, 19 and 20 are collectively known as the Wreck Act").

> removed or abandoned, and the neglect or failure of the said, owner, lessee, or operator so to do shall be unlawful; and it shall be the duty of the owner, lessee, or operator of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418 and 502 of this title.

The Wreck Act imposes a duty on the owner, lessee, or operator of a vessel to remove its wrecked vessel. *See University of Texas Medical Branch at Galveston v. United States,* 557 F.2d 438 (5th Cir. 1977); *In re the Matter of Transporter Marine,* 217 F.3d 335, 338 (5th Cir. 2000) (citing *University of Texas Medical Branch at Galveston* as permitting the government to recover from a negligent party the costs of wreck removal unfettered by the constraints of a limitation proceeding).[5] Criminal sanctions for

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[5] The Fifth Circuit's own summary of its decision in *University of Texas,* as explained in *In re Transporter Marine,* where it noted the "dearth of authority" regarding scope of exemption from the Limitation Act, is instructive:

> In [*University of Texas*], the United States spent some three million dollars to remove a wrecked vessel from the sea bottom. The vessel owner filed a limitation action and the United States sought exclusion. We determined that the Wreck Act . . . , which governs allocation of costs incurred in removing a wrecked vessel, creates a statutory duty to remove the vessel. This in turn results in the owner's bearing the cost of

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violations of Section 409 are provided by Section 411, including both fines and imprisonment. 33 U.S.C. § 411.[6] Section 412 provides civil remedies for violations of the duty to remove a wrecked vessel and an in rem remedy exists against the offending vessel. 33 U.S.C. § 412. Before the 1986 amendments, the Supreme Court interpreted Section 409 to include an *in personam* remedy in favor of the government against the wreck's owner. *Wyandotte Transp. Co. v. United States,* 389 U.S. 191, (1967). Four years after the 1986 amendments, the Fifth Circuit examined *Wyandotte* and Section 409. *See In re the Matter of Barnacle Marine Management, Inc.,* 233 F.3d 865, 868 (5th Cir. 2000) (noting that *Wyandotte* interpreted Section 409 to include an implied *in personam* remedy in favor of the United States against the owner of a negligently sunk vessel for wreck removal costs).[7]

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removal, regardless of limitation. Reasoning that the government should not be penalized for promptly removing the wreck, we allowed the government to recover its costs unfettered by the constraints of a limitation proceeding.

217 F.3d at 338.

[6] Section 411 provides in part:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, 409, 414, and 415 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of up to $25,000 per day,. . . .

[7] In *Barnacle Marine,* the Fifth Circuit considered "whether 33 U.S.C. §§ 408 and 412 create an implied *in personam* remedy

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The 1986 amendments to the Wreck Act added Section 414(b), which provides:

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for the United States against the owner of a vessel that damages a public work." *Id.* at 867. Section 408 (rather than Section 409) was at issue. The United States argued that it should be permitted to pursue *in personam* recoveries against the owners of vessels that had damaged a public work, there the Columbia Lock and Dam. *Id.* at 867. The Fifth Circuit rejected the argument, noting that Section 408 did *not* provide an *in personam* remedy against vessel owners, and it refused to imply one. *Id.* at 870.

Importantly, the Fifth Circuit in *Barnacle Marine* inferred a difference between Section 908 and 409 (and aided by the Supreme Court decision in *Wyandotte*) when deciding whether an *in personam* remedy exists for Section 908. *See id.* (noting that *Wyandotte Transp. Co. v. United States,* 389 U.S. 191, 196-97 (1967) interpreted Section 409 to include an implied *in personam* remedy in favor of the United States against the owner of a negligently sunk vessel for wreck removal costs).

Ultimately, the Fifth Circuit determined that *Wyandotte*'s reasons for implying an *in personam* remedy under Section 909 did not apply to the Section 408 case before it. In declining to imply an *in personam* remedy under Section 408, the Fifth Circuit observed:

> *Wyandotte* does not control this § 408 case because the *Wyandotte* Court expressly relied on language peculiar to § 409 in implying an *in personam* remedy in favor of the United States against the vessel owner. The Court observed that 409 created a duty on the owner of the sunken vessel to remove it. . . . This duty triggered the right of the United States to a declaratory judgment directly the vessel owner to remove the wreck. The Court stated that "[i]t is but a small step from declaratory relief to a civil action for the Government's expenses incurred in removing a negligently sunk vessel." *Wyandotte,* 389 U.S. at 204, 88 S.Ct. 379 (citation omitted).

> The owner, lessee, or operator of such vessel, boat, watercraft, raft, or other obstruction as described in this section shall be liable to the United States for the cost of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a). Any amount recovered from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

The Court finds that an in personam claim exists under Section 409 in favor of the United States.

II.

Is it appropriate for the Court to exclude the United States from the reach of the Limitation Act?

The parties dispute whether the government may pursue an *in personam* Wreck Act claim outside the Limitation Act to recover removal expenses against the owner of a wrecked vessel, regardless of fault. At the heart of the dispute is whether the Wreck Act now imposes a strict liability obligation rather than a fault-based obligation on Southern Scrap under Section 409. In amending Section 409, Congress changed the text from "or to voluntarily or carelessly sink" to read "or to sink", simply omitting the words "voluntarily or carelessly." This change is of influence on the Court.

Southern Scrap contends that it should not be denied the protections of the Limitation Act, 46 U.S.C. § 183, because it was not at fault for the drydock's sinking. Southern Scrap's argument suggests a fault-based inquiry. But omission of the words "voluntarily or carelessly" from the text of the Wreck Act was not, as Southern Scrap contends, simply a deletion of "duplicative and unnecessary language." Indeed, in maintaining its position, Southern Scrap casually ignores the Fifth Circuit's comment that: "In 1986, nineteen years after *Wyandotte,* Congress changed 409's standard for liability from negligence to strict liability. The section was amended in 1986 by substituting the words 'or to sink' for 'or to voluntarily or carelessly sink'. . . . " *See Barnacle Marine,* 233 F.3d at 868 n. 6.

In *Wyandotte Transp. Co. v. United States,* 389 U.S. 191, (1967), the Supreme Court interpreted Section 409 to include an implied *in personam* remedy in favor of the United States against the owner of a negligently sunk vessel for expenses incurred in removing that vessel. The Supreme Court rejected the wreck owner's argument that the specified remedies in the Act were exclusive, noting that the meager criminal penalties plus the United States' *in rem* rights would not serve to reimburse the United States for wreck removal expenses. *Id.* But *Wyandotte* did not resolve whether the Wreck Act claims were subject to the Limitation Act.

Ten years after *Wyandotte,* however, the Fifth Circuit addressed that question, and answered it in favor of the United States. *See University of Texas Medical Branch at Galveston v. United States,* 557 F.2d 438 (5th Cir. 1977) The Fifth Circuit instructed that "the limitation Act does not apply to the government's civil suits under § 15 of the Rivers and Harbors Act for wreck removal expenses against parties negligently responsible for the wreck." *Id.* at 452. Southern Scrap attempts to escape application of *University of Texas* by underscoring that it was without fault. The point is weak.

Nine years after *University of Texas,* Congress amended the Wreck Act by substituting the words or to sink" for "or to voluntarily or carelessly sink." The Fifth Circuit has noted that this new text "changed the standard for liability from negligence to strict liability." *See Barnacle Marine Management, Inc.,* 233 F.3d at 868 n. 6. The Court agrees; Southern Scrap's assertion that what the appeals court wrote was mere dicta is unpersuasive and otherwise betrayed by the statutory language.[8] The text is uncomplicated.

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[8] The Court also declines to indulge Southern Scrap's argument that the United States' alleged negligence in the failure of MR-GO during Hurricane Katrina bars its Wreck Act claim because the United States caused the wreck. This is not relevant to the limited question of whether the Wreck Act claims are subject to the Limitation Act.

Based on the language of Section 409,[9] as well as the wisdom of *Wyandotte, University of Texas,* and *Barnacle Marine,* the United States has an implied *in personam* remedy against the owner of a sunk vessel, regardless of the wreck owner's fault in sinking the vessel, and escapes the bar of the Limitation Act. Southern Scrap may persist in its assertions of the negligence of the Corps in being responsible for the storm surge that caused the drydock to sink when it counters with its defenses in the government's *in personam* action against Southern Scrap.

Accordingly, the United States' motion to lift or modify the order directing issuance of notice and restraining prosecution of claims is GRANTED.

New Orleans, Louisiana, April 26, 2007.

/s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES
DISTRICT JUDGE

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[9] The Court further notes that the Fifth Circuit has recently observed that "[t]he purpose of amending the Wreck Act in 1986 was to increase the ability of the Corps of Engineers to recover wreck-removal expenses." *See Fuesting v. Lafayette Parish Bayou Vermilion District,* 470 F.3d 576, 580 (5th Cir. 2006) (citing S. Rep. No. 99-126, at 26 (1985)).

**46 App. USCA § 183. Amount of liability**

(a) Privity or knowledge of owner; limitation

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

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**33 USCA § 409. Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels**

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation.

And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, it shall be the duty of the owner, lessee, or operator of such sunken craft to immediately mark it with a buoy or beacon during the day and, unless otherwise granted a waiver by the Commandant of the Coast Guard, a light at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner, lessee, or operator so to do shall be unlawful; and it shall be the duty of the owner, lessee, or operator of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title. The Commandant of the Coast Guard may waive the requirement to mark a wrecked vessel, raft, or other craft with a light at night if the Commandant determines that placing a light would be impractical and granting such a waiver would not create an undue hazard to navigation.

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## 33 USCA § 414. Removal by Secretary of the Army of sunken water craft generally; liability of owner, lessee, or operator

### (a) Removal authority

Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided,* That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also,* That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days'

notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided,* That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States.

**(b) Liability of owner, lessee, or operator**

The owner, lessee, or operator of such vessel, boat, watercraft, raft, or other obstruction as described in this section shall be liable to the United States for the cost of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a) of this section. Any amount recovered from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

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## 33 USCA § 415. Summary removal of water craft obstructing navigation; liability of owner, lessee, or operator

### (a) Removal authority

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the actual expense, including administrative expenses, of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to

reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

**(b) Removal requirement**

Not later than 24 hours after the Secretary of the Department in which the Coast Guard is operating issues an order to stop or delay navigation in any navigable waters of the United States because of conditions related to the sinking or grounding of a vessel, the owner or operator of the vessel, with the approval of the Secretary of the Army, shall begin removal of the vessel using the most expeditious removal method available or, if appropriate, secure the vessel pending removal to allow navigation to resume. If the owner or operator fails to begin removal or to secure the vessel pending removal or fails to complete removal on an expedited basis, the Secretary of the Army shall remove or destroy the vessel using the summary removal procedures under subsection (a) of this section.

**(c) Liability of owner, lessee, or operator**

The owner, lessee, or operator of such vessel, boat, water craft, raft, or other obstruction as described in this section shall be liable to the United States for the actual cost, including administrative

costs, of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a) of this section. Any amount recovered from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

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(2)

No. 08-696

# In the Supreme Court of the United States

SOUTHERN SCRAP MATERIAL COMPANY, L.L.C., AS OWNER OF THE SOUTHERN SCRAP DRYDOCK, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether 46 U.S.C. 30505 (2006) limits the liability of a non-negligent vessel owner when the United States seeks reimbursement for expenses incurred in removing a wrecked vessel obstructing navigable waters in violation of 33 U.S.C. 409.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 541 F.3d 584. The opinion of the district court (Pet. App. 28-37) is not published in the *Federal Reporter* but is available at 2007 WL 1234995.

## JURISDICTION

The judgment of the court of appeals was entered on August 25, 2008. The petition for a writ of certiorari was filed on November 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (Rivers and Harbors Act),

contains several sections known as the Wreck Act, 33 U.S.C. 409, 411, 412, 414, 415. As originally enacted, the provision now codified at 33 U.S.C. 409 made it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Rivers and Harbors Act § 15, 30 Stat. 1152. That section further provided that "whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, * * * it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same." *Ibid.* If the owner failed to do so, the vessel was subject "to removal by the United States as hereinafter provided for" in 33 U.S.C. 414 and 415. Rivers and Harbors Act § 15, 50 Stat. 1153.

Section 414, in turn, set out a procedure by which the Secretary of the Army could remove the wrecked vessel without incurring liability to the vessel owners. It allowed the United States to sell the vessel and its contents, with "any money received from the sale of any such wreck * * * covered into the Treasury of the United States." Rivers and Harbors Act § 19, 30 Stat. 1154. Section 415 provided for expedited removal procedures in emergency situations, and it too allowed the United States to sell the wrecked vessel and its contents, although the government's recovery from such a sale was limited to its removal expenses. § 20, 30 Stat. 1154-1155.

b. The original Wreck Act provided criminal penalties for violations of Section 409, see 33 U.S.C. 412, but it did not expressly provide in personam civil remedies for the United States. In *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), this Court held that the statute impliedly authorized the United States to bring an in personam action against a negligent vessel

owner to recover the government's expenses in removing a wrecked vessel. *Id.* at 204-205.

c. In 1986, Congress made several amendments to the Wreck Act. As relevant here, the amendments added language to Sections 414 and 415 that provided that when the government removes a vessel under one of these sections, the vessel's owner is "liable to the United States" for any removal costs that "exceed[] the costs recovered under" the in rem sale procedures. Water Resources Development Act of 1986, Pub. L. No. 99-662, § 939(b), 100 Stat. 4199. Additionally, Congress deleted the phrase "voluntarily or carelessly" in Section 409, making it unlawful to "permit or cause [a vessel] to be sunk" in navigable waters. § 939(a)(1), 100 Stat. 4199.

2. Petitioner owned a floating drydock located on the Industrial Canal in New Orleans. When Hurricane Katrina struck New Orleans on August 29, 2005, the drydock broke free from its moorings and sank in the canal. The United States Army Corps of Engineers (Corps) concluded that the sunken drydock was a hazard to navigation in the heavily traveled waterway, and it asked petitioner to remove the wreck. Petitioner stated that it would be unable to do so in a timely fashion, so the Corps hired a contractor to remove the vessel. Removal costs totaled about $8 million, which petitioner refused to pay. Pet. App. 4-5.

3. Petitioner filed a petition for limitation of liability in the Eastern District of Louisiana. Pet. App. 5. Petitioner invoked the Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (Limitation Act) (46 U.S.C. 30505 *et seq.*).* The Limitation Act limits a vessel owner's liability for certain mari-

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* All references to Sections 30505 and 30511 are to the statute as it will be codified in the 2006 edition of the United States Code.

time-related legal claims, including claims arising from collisions, damage to freight, and "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner." 46 U.S.C. 30505(b). If the Limitation Act applies to a claim, the owner's liability "shall not exceed the value of the vessel and pending freight." 46 U.S.C. 30505(a). Petitioner contended that the post-accident value of the drydock was about $316,000, and it sought to limit its liability to that amount. Pet. App. 5. Petitioner also asked the district court to enjoin all actions against it based on the sinking of its drydock. *Id.* at 29; see 46 U.S.C. 30511. The district court granted that request and issued an order requiring any party with a claim against petitioner to file the claim as part of the limitation action. Pet. App. 6.

The United States filed a timely claim seeking full reimbursement under the Wreck Act for the removal expenses it had incurred. Pet. App. 6. Thereafter, it moved to modify the district court's order to permit it to pursue its Wreck Act claim in a separate proceeding against petitioner, free of any liability cap under the Limitation Act. *Ibid.*

The district court granted the motion. Pet. App. 28-37. The court concluded that the United States had an in personam remedy against petitioner under the Wreck Act, and that the remedy was not impeded by the Limitation Act, even in cases where the ship-owner was not negligent. *Id.* at 34-37.

4. Petitioner took an interlocutory appeal from the district court's order modifying its injunction. The court of appeals affirmed. Pet. App. 1-25.

The court of appeals first examined whether, independent of the Limitation Act, the United States could

seek reimbursement under the Wreck Act for a wreck that was not caused by the owner's negligence. The court answered that question in the affirmative, noting that when *Wyandotte* had recognized an implied right of action in cases of negligence, this Court had relied in part on the reference in Section 409 to "voluntarily or carelessly" sinking a vessel. Pet. App. 16. Congress's decision to remove that language when it amended the statute in 1986 showed that Congress intended to do more than merely codify *Wyandotte*; it also intended to impose strict liability on vessel owners. *Id.* at 16-17. The court of appeals drew additional support from the fact that the 1986 amendments expressly allowed the government to obtain in personam recovery for all removals under Sections 414 and 415, whether or not the wrecks were caused by negligence. *Id.* at 17-18.

The court of appeals next determined that the Limitation Act posed no bar to the United States' claim. The court explained that the application of the Limitation Act to a Wreck Act claim would nullify the 1986 amendments to the Wreck Act, as it would limit the United States to the in rem recovery that had previously existed. Pet. App. 20-21. The court therefore applied the principle that "when two statutes irreconcilably conflict, the more recent statute controls." *Id.* at 21. Finally, the court examined the Limitation Act's legislative history and concluded that the statute had not been intended to apply to wreck-removal claims brought by the United States. *Id.* at 24-25.

## ARGUMENT

Petitioner renews its claim (Pet. 11-25) that it should be free of in personam liability for the expenses the United States incurred in removing petitioner's drydock after it broke loose from its moorings and sank in a

heavily traveled waterway. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner does not suggest that the decision below conflicts with any decision of any other court of appeals. Indeed, petitioner admits (Pet. 13) that this is the first case in which any court has considered the relationship between the Limitation Act and the reimbursement provisions of the post-1986 Wreck Act when a shipowner is not negligent. Instead, petitioner asserts (Pet. 17-18) that the decision of the court of appeals conflicts with the principle that repeals by implication are disfavored. See, *e.g.*, *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141 (2001). Even if that were true, such an abstract conflict about general principles of statutory interpretation would not warrant this Court's review. In any event, the court of appeals correctly interpreted both the Limitation Act and the Wreck Act.

By its terms, Section 414 makes a vessel owner "liable to the United States for the cost of removal * * * which exceeds the costs recovered" under the in rem sale provisions of that section. 33 U.S.C. 414(b). Similarly, Section 415 provides that a vessel owner "shall be liable to the United States for the actual cost, including administrative costs of removal * * * which exceeds the costs recovered" under that section's in rem sale provisions. 33 U.S.C. 415(c). Although neither section mentions the Limitation Act, Sections 414 and 415 both impose in personam liability on a vessel owner, over and above the value of the vessel that is recoverable in rem, when the United States removes the vessel under one of

these sections. And neither section limits that liability to cases in which the vessel owner is negligent.

Petitioner nonetheless attempts (Pet. 19) to find such a limitation through a strained reading of the first sentence of Section 409. Despite the fact that Congress removed the words "voluntarily or carelessly" from that sentence in 1986, petitioner reads the remaining words of the sentence as requiring affirmative action on the part of the vessel owner before there can be Wreck Act liability. See 33 U.S.C. 409 ("It shall not be lawful to * * * sink, or permit or cause to be sunk, vessels or other craft in navigable channels."). That reading is difficult to reconcile with the broad language of the "*permit* or cause to be sunk" phrase, and it ignores Congress's conscious decision to delete the "voluntarily or carelessly" phrase.

More to the point, it is the *second* sentence in Section 409, not the first sentence, that subjects a vessel to removal under Sections 414 and 415: "And whenever a vessel * * * is wrecked and sunk in a navigable channel, * * * it shall be the duty of the owner * * * to commence the immediate removal of the same, * * * and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States." 33 U.S.C. 414, 415. That sentence contains no language that can be read to limit its reach only to cases of negligent sinking. Accordingly, Section 409 gives the United States the right to use Sections 414 and 415 to remove non-negligently caused wrecks, and the removal of such wrecks subjects the owner to the in personam liability provisions in both sections.

If the Limitation Act applied to limit petitioner's liability, it would be directly contrary to the Wreck Act, and the court of appeals correctly gave effect to the

later-enacted statute. Pet. App. 21-22. But the Limitation Act can be reconciled with the Wreck Act, although not in a way that helps petitioner. The Limitation Act applies only to losses or damages incurred "without the privity or knowledge of such owner." 46 U.S.C. 30505(b); see *American Car & Foundry Co.* v. *Brassert*, 289 U.S. 261, 264 (1933) (explaining that because of the "privity or knowledge" language, the "liability thus limited is an imputed liability; * * * [f]or his own fault, neglect, and contracts the owner remains liable"). Petitioner suggests that when a wreck occurs for reasons other than the vessel owner's negligence, the Limitation Act absolves the owner from liability because the wreck occurred without its "privity or knowledge." But under the Wreck Act, it is not the mere fact of the wreck that gives rise to the owner's in personam liability. Rather, the owner becomes liable to the government only after failing to carry out its "duty * * * to commence the immediate removal of the same." 33 U.S.C. 409. And as the Second Circuit has recognized, the breach of that duty is within the "privity or knowledge" of the owner, bringing the owner outside the Limitation Act's protections. *In re Chinese Maritime Trust, Ltd.*, 478 F.2d 1357, 1360-1361 (1973), cert. denied, 414 U.S. 1143 (1974).

2. Contrary to petitioner's suggestion (Pet. 15-16), the court of appeals' decision is in no way inconsistent with *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967). The Court in *Wyandotte* expressly declined to consider the application of the Wreck Act to cases in which the vessel owner was not negligent: "Questions involving a non-negligent sinking * * * are not now before us and we do not mean to indicate what relief, if any, may be available to the Government in that

situation." *Id.* at 197 n.5. Similarly, while the Court discussed and analyzed the Limitation Act, see *id.* at 205-206, it did not consider whether the Limitation Act applies in Wreck Act cases. See *id.* at 205 n.17 ("We do not, of course, pass on the applicability of the Limitation Act, before or after passage of the Rivers and Harbors Act, to the facts of the case now before us."). More importantly, *Wyandotte* merely construed the pre-1986 version of the Wreck Act. Nothing in that decision can be understood to be an interpretation of the current version of the Wreck Act, which now contains an express recognition of the right of the United States to bring an in personam reimbursement action. 33 U.S.C. 414(b), 415(c).

Petitioner nonetheless alleges (Pet. 16) that the decision below conflicts with the "policy considerations and equities that drove the decision" in *Wyandotte*. Such an abstract "conflict," which does not entail a conflict with any holdings of this Court, does not warrant review. And to the extent that petitioner alleges such a conflict with the court of appeals' own precedents, (Pet. 13-17), there is also no basis for this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, there is no conflict with the "policy considerations" of *Wyandotte*. Petitioner claims (Pet. 16-17) that the decision below is in tension with *Wyandotte* because it will allow a negligent party (allegedly the government) to shift the costs of removal onto a non-negligent party. But there is no basis for supposing that the government acted negligently in this case. As the court of appeals explained, given the procedural posture of the case, it was appropriate for that court to treat the district court's order as though it had come "in the form

of a denial of a Rule 12(b)(6) motion brought by" petitioner. Pet. App. 7. The court therefore accepted as true the facts as stated in the United States' claim, which contained no allegations of the government's negligence. *Ibid.* Indeed, petitioner's own complaint was devoid of any allegations of government negligence; the closest petitioner came was the nonspecific allegation that its drydock had been sunk by "Act(s) of God or by other man-made or natural conditions beyond Petitioner's control and/or by the fault or neglect of other parties and/or vessels." Compl. 5.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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